Book Review III: The Investment Treaty Regime and Public Interest Regulation in Africa By Dominic Npoanlari Dagbanja

By:

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10 June 2024

Introduction

With the recent decision by the African Heads of States to adopt the Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, Dr Dominic Dagbanja's monograph on *The Investment Treaty Regime and Public Interest in Africa* is a welcome addition to the growing list of monographs on Africa's foreign investment law regimes. This book which is a based on Dr Dagbanja's 2015 doctoral dissertation provides an original contribution to existing literature by focusing on the constitutionality of investment treaties. It deals with themes and issues which are critical for understanding Africa's complex foreign investment protection and promotion laws. Although scholars have examined the linkages between constitutional law and international

investment law notably using case studies from Europe and Latin America, this is the first monograph to focus on this issue from an African perspective.

On the first page of *The Investment Treaty Regime and Public interest in Africa*, the reader is immediately confronted with the pertinent question 'What limits do the principles of constitutional governance and the right of states to regulate in customary international law, international environmental treaties and international human rights treaties place on the authority of African states to sign investments treaties?' This fundamental research question gives an early glimpse into the comprehensive analysis that is to follow in the book's six chapters. Using the imperatives theory, Dr Dagbanja argues vehemently that African states cannot and should not sign international investment agreements (IIAs) which constrain their constitutional right to regulate because the primary role of states is to protect public interest. To support his argument, he focuses on the jurisdiction of domestic courts, human rights, the right to a clean environment and the right to development in Africa. In this book review, I highlight four topical issues which emerge from Dr Dagbanja's book.

Constitutional Law as Domestic Investment Law

A central issue which emerges from the book under review is the relationship between constitutions and international investment law. The main argument made is that the IIA obligations of African states are incompatible with their legal obligations to protect the public interest under national constitutions and general international law. At the heart of this conundrum is what can be described as a continuing battle between domestic law and international law. First-year students of constitutional law are taught that the constitution is the grundnorm of the legal system and supreme law from which all other laws derive their validity. At the same time, international law students are taught that peremptory norms of general international law (jus cogens) are hierarchically superior to other rules of international law and are universally applicable. For Dr Dabanga, reconciling these two positions means that tribunals interpreting investment treaties must give normative priority to constitutional provisions. He argues that this is important because African states derive their powers from these norms for public good. However, as the cases reviewed in the book show, tribunals have held that in accordance with Article 27 of the VCLT, states cannot use constitutional laws as a justification for

failure to comply with investment treaty obligations. Dr Dagbanja argues that a combined reading of Articles 7, 27 and 46 of the VCLT should mean that the policy outcomes of a treaty cannot be separated from its validity. While this is an interesting argument, tribunals have adopted different approaches and, in most cases, states have invoked constitutional provisions only as an after the fact defence rather than as ground for policy objectives. For example, in Eco Oro Minerals Corp v Republic of Colombia, the Tribunal noted that even though Colombia had the responsibility to protect the Santurbán Páramo area under environmental law and under the Constitution, there was a 555% increase in investments in the mining sector and grant of mining titles between 1990 and 2009 in the area. An investment arbitration award which aligns with Dr Dagbanja's position is *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, in which the tribunal dismissed the treaty claims as the investor had failed to comply with the regulatory regime and environmental law governing the Mrima Hill forest and nature reserve.

Although states are increasingly invoking constitutional provisions in investment treaty claims, most IIAs merely refer to compliance with domestic law broadly. Express references to constitutional law can be found in very few IIAs like the Brazil- India BIT(2020) and the India - Kyrgyzstan BIT (2019) . It is thus clear that as many African constitutions retain post-independence era constitutional provisions on expropriation and compensation, constitutions are no longer major sources of foreign investment regulation. Although their provisions on property rights remain relevant and important, the difficult process of constitutional reform cannot be compared with the less difficult process of enacting investment promotion legislation. Overall, while the arguments made by Dr Dagbanja on constitutionality and *ius cognes* appear attractive in theory, in practice genuine conflicts between IIAs and peremptory norms are very difficult to conceive.

Ghana's Constitutional History and the Validity of International Economic Transactions

Unlike the doctoral dissertation which formed the basis of the monograph, Dr Dagbanja has broadened the scope of his research beyond Ghana to include case studies of Cameroon, Egypt, Kenya, Nigeria and South Africa. In contrast to these jurisdictions, Ghana has been a respondent in several investment

arbitration claims involving pleadings based on Ghana's constitution. Most of these cases which are purely contract-based disputes include *Balkan Energy Limited (Ghana) v Ghana, Bankswitch Ghana Ltd (Ghana) v Ghana, and Waterville Holdings (BVI) Limited v Ghana* are discussed in detail in chapter three. As the author acknowledges, constitutional practice varies across Africa and Ghana remains a very unique case study. Thus, while the author has chosen to extend his analysis to other jurisdictions with good reason, a thesis on constitutionality and international investment law underscores the difficulties of applying the same thesis to Africa's 54 other jurisdictions.

Article 181 of the Constitution of the Republic of Ghana 1992 was a key issue in the cases examined by Dr Dagbanja. Ghana's 1992 constitution which was developed as part of the process to transition the country from military to civilian rule is unique because of its strong emphasis on development, international business transactions and state contracts. Notably, Ghana had signed only 5 BITs before 1991 when drafts for the 1992 constitution were being completed. It is thus clear that the drafters of the 1992 Constitution drafted Article 182 with reference to state contracts. In the 1970s and 1980s, Ghana renegotiated several colonial era concessions including the Goldfields Corporation, the Ghanaian Italian Petroleum Company, Consolidated African Selection Trust, GOIL Company Limited and Volta Aluminium Company Limited (VALCO).

Since 1992, constitutional democracy in Africa has been marred by economic decline, electoral and ethnic violence, poor governance, corruption and more recently successive military coups. At the same time, African states have queried the existing international investment law regime. As of 2002, Dr Samuel Kwadwo Boaten Asante, the chairman of the committee of experts who drafted Ghana's 1992 Constitution noted that proper procedures had not been established in Ghana for parliamentary approval of international business transactions. In 2012, Ghana's Supreme Court while interpreting the meaning of an international business transaction repeated a request to Ghana's Parliament to enact a Bill making modifications to Article 181(5) of the Constitution to aid greater legal certainty. There are no indications that these amendments have been made. More recently in January 2023, the Tribunal in *Beijing Everyway Traffic and Lighting Company Limited v Ghana* held that references to domestic law in the China-Ghana BIT (1989) cannot be

interpreted to mean that every claim for expropriation must be referred to the High Court of Ghana as a matter of Ghanaian constitutional law. Dr Dagbanja's monograph is thus a reminder to African states that constitutional defences to IIA claims as an after the fact are not substitutes for proper IIA drafting, pre-establishment investment facilitation, good governance and investment policy coherence.

Constitutional Law, Economic Development, Good Governance and People Based Sovereignty

As the title of the monograph suggests, a key theme in the book is public interest and the right of states to regulate. Even though Dr Dagbanja rightly argues that public interest must be prioritised in economic transactions, in practice this has not been the case. In several cases, corruption and misuse of natural resources has been an issue. In fact, without the publicity attached to international investment arbitration, several state contracts will never be made fully public. For example, recently the ECOWAS Court of Justice dismissed a suit filed by NGOs alleging corrupt management of Ghana's gold resources. Related to suits like this is the question of how African governments can be held accountable by constituents for misuse and management of economic resources using constitutional provisions. The solemness of appeals to 'we the people' found in the recitals of African constitutions is a sharp contrast from what in practice is a state-based sovereignty. For example in BSG Resources v Guinea, while recognizing that the Guinea Constitution provides that international treaties shall prevail over national law, the Tribunal referred to the preamble of the Constitution of Guinea which provides for fighting against corruption.

Regionalism and Reform of International Investment Law in Africa

In chapter six, Dr Dagbanja examines the reform of international investment treaties and investor-state arbitration in Africa making several bold proposals. These include the requirement that IIAs protect only investments which make tangible contributions to the economic development of the host state; and omitting indirect expropriation, national treatment and most favoured nation clauses from future IIAs. He also advocates for clearly defined fair and equitable treatment clauses. Finally, he argues that investor-state disputes should be

settled using only national courts and that constitutional decisions should be non-arbitrable. While these proposals are consistent with arguments made by some other scholars and provisions of the 2016 Pan African Investment Code, they do not reflect the pragmatism of African economic integration which aims to create a level-laying field for intra-African investment. It is thus not surprising that to a large extent, the 2023 final draft AfCFTA Investment Protocol departs from the proposals made by Dr Dagbanja. Even though the Protocol is distinct for its focus on sustainable development and the right to regulate, it adopts treatment standards found in traditional IIAs like most favoured nation treatment. Article 46 (3) of the Investment Protocol provides that the procedure for ISDS shall be set out in an Annex which is to be negotiated within 12 months. Dr Dagbanja's arguments which favour domestic courts do not give enough room for the exercise of jurisdiction by African courts and tribunals like the Common Court of Justice and Arbitration of the Organization for the Harmonization in Africa of Business Law or the ECOWAS Court of Justice. This is pertinent considering that, Africa's regional trade courts have played a very important role in protecting social and economic rights.

Conclusion

Overall, *The Investment Treaty Regime and Public Interest Regulation in Africa* is an excellent monograph which contributes original ideas to ongoing debates on reform of investment law in Africa. By critically examining the constitutionality of international investment agreements and investment arbitration, it forces us to confront fundamental issues like the importance of good governance, effective negotiations and ensuring coherence between domestic investment laws, BITs and regional IIAs.

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